KEJURUTERAAN LETRIK MAN HOE SDN BHD v. MAX-BENEFIT SDN BHD; METROPLEX EQUITY HOLDINGS SDN BHD (APPLICANT)

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[SUIT NO: D3-28-132-2008]
14 SEPTEMBER 2015

CIVIL PROCEDURE: *Contempt of court – Order of committal – Statement made by appointed liquidator in affidavit – Whether intended to be false and misleading – Failure to appreciate meaning of word 'potentially' in statement – Whether mens rea proven against liquidator – Whether there was interference with administration of justice*

CIVIL PROCEDURE: *Striking out – Doctrine of res judicata – Whether applicable – Contempt proceeding – Failure of applicant to take contempt proceedings against liquidator in earlier proceeding when impugned statement had been alluded to – Whether against principle of res judicata*

The applicant was a creditor and contributory of the respondent, who had been wound up. In an earlier proceeding, the appointed liquidator had sworn an affidavit to the effect the land premium of the respondent could potentially amount to RM53,191,595.16 in value. The applicant submitted that this statement was not true, and that the liquidator, who was an officer of the court, had interfered with the administration of justice. The applicant argued that there was a *prima facie* case for contempt of court against the liquidator because of this impugned statement. Therefore, the applicant applied *vide* encl. 87 for leave to commence committal proceedings against the liquidator. The respondent *vide* encl. 92 submitted that encl. 87 should be struck out because that application for leave to commence committal proceedings was *res judicata*. Further, encl. 87 was said to be frivolous, vexatious and an abuse of the court's process.

Held (dismissing applicant's application for leave to commence committal proceedings; allowing respondent's application for striking out):

(1) The liquidator should always be protected in discharging his duties unless it is proven that there are strong reasons to challenge his manner of managing the wound up company and in this regard, for the present case, the applicant must satisfy the accusation that the liquidator had been misleading in respect of the impugned statement that the land premium of the respondent could potentially amount to RM53,191,595.16. (para 12)

(2) There was a qualification to that impugned statement by the word 'potentially' meaning it was not definite that the liquidator had said with certainty that the land premium amounted to RM53,191,595.16. The

applicant had failed to appreciate the meaning of the English word 'potentially'. The word 'potentially' simply means it has the possibility of crystallising or happening but does not in any manner suggest that it is definitely concluded. Herein, the applicant failed as there was no proof to suggest that the impugned statement was false or misleading. (para 14)

(3) The applicant was not able to prove that the liquidator had the intention not to give a true answer to the statement that had been made. The liquidator had expressly qualified the impugned statement and explained that subsequently the state authorities had agreed to impose a lower land premium that was not based on current market value. *Mens rea* was also not proven against the liquidator. The liquidator thus could not be accused of harbouring an intention to mislead because the statement as explained was made in the context of what transpired in a meeting with the state authorities. In this regard, there was absolutely no reason to disbelieve the sworn statement of the liquidator. (paras 17 & 20)

(4) The duty of the applicant in proceeding with committal proceedings was onerous and had not been proven beyond reasonable doubt. Thus, the application *vide* the notice of motion for leave to commence committal proceedings against the liquidator should not be allowed. (para 21)

(5) The applicant had been before this court at least on two previous occasions, both for encls. 19 and 60 to remove the liquidator. For encl. 60, the applicant had already alluded to the impugned statement against the liquidator. The applicant however chose not to take contempt proceedings against the liquidator when encl. 60 was filed although the impugned statement was a matter already known to the applicant when the same was filed. This was clearly against the principle of *res judicata* as the applicant should have brought the action on the alleged contempt when encl. 60 was filed. The scope of *res judicata* includes a situation where a matter is possible and present to be raised, but was not put for deliberation for whatever reasons by the party that could raise such matter. Therefore, encl. 87 was without doubt *res judicata*. (paras 25-26 & 28)

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors (No 2) [2007] 9 CLJ 400 HC ***(foll)***

Greenhalgh v. Mallard [1947] All ER 255 ***(refd)***

Huawei Tech Investment Co Limited v. Transition Systems (M) Sdn Bhd [2013] 1 LNS 329 CA ***(refd)***

Jaginder Singh & Ors v. The Attorney-General [1983] 1 CLJ 69; [1983] CLJ (Rep) 176 FC ***(foll)***

Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Another Appeal [2010] 2 CLJ 858 CA ***(refd)***

Yap Cheng Hai v. Yap Cheng Hai Feng Shui Center of Excellence Sdn Bhd & Ors [2010] 1 LNS 1702 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 236(3)

For the applicant - Sri Rajan Navaratnam (Malcom Fernadez & Sharifah Munirah Syed Bakhtiar with him); M/s Chellam Wong

For the respondent - Gopal Sreenevasan (Daniel Albert & Anis Nadia Jamaluddin with him); M/s Daniel & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Abu Bakar Jais JC:

Introduction

[1] In this case there are two notices of motion for the determination of the court. First is the notice of motion (encl. 87) from the applicant for leave to commence committal proceedings against the liquidator of the respondent and second the notice of motion (encl. 92) from the respondent for the striking out of the said applicant's notice of motion.

Material Facts

[2] The respondent was earlier wound up and a liquidator was appointed for the same. The applicant is a creditor and contributory of the respondent. In an earlier proceeding, the liquidator had sworn an affidavit to the effect the land premium of the respondent could potentially amount to RM53,191,595.16. The applicant as seen in its notice of motion (encl. 87) is challenging this very statement. The applicant submitted this statement is not true because the liquidator knew the land premium is lower. The applicant says that since this statement is not true, the liquidator who is an officer of the court, had interfered with the administration of justice. The applicant says there is a *prima facie* case for contempt of court against the liquidator because of this impugned statement. Therefore, as stated, the applicant applies *vide* encl. 87 for leave to commence committal proceedings against the liquidator.

[3] The respondent *vide* encl. 92 says encl. 87 should be struck out because that application for leave to commence committal proceedings is *res judicata*. Enclosure 87 is also said to be frivolous, vexatious and an abuse of the court's process. It is also submitted it is filed to harass the liquidator.

Enclosure 19

[4] It should be pointed out that this is not the first time the respondent and the applicant are before the court. Both had been here before for the application for encl. 19 by another company to remove the liquidator. The basis for this application is the alleged non-disclosure by the liquidator of the terms of a sale and purchase agreement ('SPA') which the liquidator had entered into. The applicant in the present case now had supported that application *vide* encl. 19. This encl. 19 was struck out by this court on 27 February 2014. There was no appeal to strike out this enclosure.

Enclosure 60

[5] The applicant upon the striking out of encl. 19, under its own name subsequently filed a similar and in fact identical application, encl. 60 for the removal of the liquidator on similar ground that the liquidator had failed to disclose the terms of the same SPA. Here again the respondent and applicant were on opposing sides, evidencing again both presence in this court prior to the present notices of motion *vide* encls. 92 and 87.

[6] As encl. 19 had been struck out by this court, the respondent applied to strike out encl. 60 on the ground of *res judicata*. In the course of argument for encl. 60, the applicant told the court the liquidator had indicated the land premium of the respondent could potentially amount to RM53,191,595.16, the same statement being impugned by the applicant *vide* encl. 87. Therefore the impugned statement, the very basis of encl. 87, actually had been an issue earlier in encl. 60. In response to the allegation on the impugned statement in encl. 60, the liquidator explained why the impugned statement was not misleading or false in any manner. Enclosure 60 was eventually struck out on the ground of *res judicata* by this court and this decision was affirmed by the Court of Appeal on 12 February 2012.

Findings Of Court

[7] This court will deal with encl. 87 first in stating the reasons for the judgment.

[8] Before the appeal at the Court of Appeal was heard for encl. 60, the applicant filed the present notice of motion encl. 87 before this court. This is filed pursuant to s. 236(3) of the Companies Act 1965 ('CA') which states:

> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[9] The Court of Appeal's case of *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Another Appeal* [2010] 2 CLJ 858; [2009] 3 MLJ 191 in interpreting s. 236(3) of the CA as narrated above decided that since a liquidator appointed is an officer of the court, leave is required to commence

committal proceedings against such liquidator. Therefore I am of the view that the stringent condition for leave to be obtained first before the committal proceedings is commenced on the liquidator, ought to mean that the party requesting such leave must prove some cogent reasons to cite the liquidator for committal. Any attempt seen and perceived merely to hinder the liquidator as officer of the court to carry out his duties accordingly by such request for leave, should be abhorred by the courts.

[10] The learned Mary Lim J in *Yap Cheng Hai v. Yap Cheng Hai Feng Shui Center of Excellence Sdn Bhd & Ors* [2010] 1 LNS 1702; [2010] MLJU 1858 in explaining the leave as stated in the same provision said:

> The test on the grant of leave is whether the **application is not vexatious or merely oppressive.** Towards that end, the Court will ensure that no wasteful litigation is brought against the Liquidator.
>
> (emphasis added)

[11] The learned Ramly Ali J (now FCJ) elaborates in the case of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 3 MLJ 571 that for leave to be given there must be a *prima facie* case against the liquidator as noted in the relevant part of the judgment as follows:

> Therefore, before leave could be granted, the court must be satisfied that there is sufficient *prima facie* evidence to support any allegation made against the liquidator. The court finds support in the decision of the High Court in *TN Metal Industries Sdn Bhd v. Ng Pyek Yew* [1996] 4 MLJ 567 where it was held:
>
> > His task is an onerous one. He is charged with a number of statutory duties … He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might level against him. **He ought to be protected against such abuse unless here is sufficient *prima facie* evidence to support such allegation.** If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegation he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstance come to a halt. No one will venture towards this task. A Liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed …
> >
> > (emphasis added)

[12] The cases as shown indicate that there is a certain standard before such leave for committal is granted. It is also recognised the liquidator should always be protected in discharging his duties unless it is proven that there are strong reasons to challenge his manner of managing the wound up company and in this regard, for the present case, the applicant must satisfy the

A accusation that the liquidator had been misleading in respect of the impugned statement that the land premium of the respondent could potentially amount to RM53,191,595.16.

[13] Therefore on the issue of proving that the liquidator had misled the court, the learned Vincent Ng J (as he then was) in the case of *Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors (No 2)* [2007] 9 CLJ 400; [2007] 7 MLJ 276 states:

B

> Before I consider the factual merits of this application it is appropriate to bear in mind the following principles of law. It is trite law that due to the quasi criminal nature of the contempt proceedings now before me, **a heavy onus now rests with the petitioner to prove his case beyond reasonable doubt.**
>
> …
>
> [3] Of the three ingredients that the Petitioner must prove, the *two most vital ingredients, besides actus reus, are mens rea and whether the actus reus was committed with the actual or inevitable intention of frustrating or obstructing the administration of justice.*
>
> …
>
> On the question *whether the statement was intended to be false and misleading (mens rea) and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice,* this court would have to:
>
> (i) **firstly, look at the relationship between the alleged false statements and the issues to be decided in the main proceedings** (see *Keeley v. Brooking* [1979] 25 ALR 45);
>
> (ii) **secondly, bear in mind that unlike the offence of perjury, contempt requires the actual or inevitable intent or consequence of frustrating or obstructing the administration of justice** (see *Jaginder Singh & Ors v. Attorney-General* [1983] 1 MLJ 71, *Coward v. Stapleton* [1953] 90 CLR 573, *Re Bride, Ex-parte Steward* [1984] WB 455, *R v. Christopher Charles Murfett* [2004] VSC 160 and *Halsburys Laws of England*, 4th Ed Vol 9(1) pp 242 - 243);
>
> (iii) **thirdly, be mindful that a 'mere falsity of evidence is not enough to justify a contempt charge'** (see *Yee Sang Metal* [2002] HKCU 1255); and,
>
> (iv) **fourthly, be slow to draw inferences from affidavits as to the *bona fides* or *mala fides* of the alleged contemnor** (see in *Re Smith and Fawcett Ltd* [1942] Ch 304).
>
> (emphasis added)

C D E F G H

[14] Taking note of the above decision even on *actus reus* the applicant would fail as there is no proof to suggest that the impugned statement is false or misleading. This is because there is a qualification to that statement by the word "potentially" meaning it was not definite that the liquidator had said

I

with certainty that the land premium amounts to RM53,191,595.16. The applicant simply had failed to appreciate the meaning of the English word "potentially". The word "potentially" simply means it has the possibility of crystallising or happening but does not in any manner suggest that it is definitely concluded. The applicant in short had jumped the gun in accusing the statement is misleading without allowing itself sufficient time to assess fully the actual effect of that statement. The fair conclusion to this is that the applicant had intended to use the slightest reason *albeit* weak to cite the liquidator for contempt. This understanding is further strengthened as the applicant had tried to remove the liquidator by supporting encl. 19 and on its own initiated encl. 60 for the same purpose as explained earlier. In essence the concerted effort of the applicant through encls. 19, 60 and the present encl. 87 shows the hell-bent attitude of the same to hamper at all costs the effective liquidation of the respondent.

[15] More so when I consider the excerpt of the affidavit of the liquidator on the statement as follows:

> As I have previously stated, **prior to the sale of the Properties,** both the Pejabat Daerah/Tanah Petaling as well as the Menteri Besar of Selangor, Tan Sri Dato' Seri Abdul Khalid had indicated that pursuant to the Selangor Land Rules 2003, the Land Premium imposed would be based on the current market value of the said Master Lands.
>
> In this respect, I verily believe that the Land Premium of the Master Lands imposed by the State Authorities, if based on the current market value (based on the land valuation exhibited as Exhibit "**WWF-23**" in the Respondent's Affidavit No 3) **could have potentially amounted to approximately RM53,191,595.16** as indicated from the calculations below.
>
> …
>
> Accordingly, I state that as a material term of the sale of the Properties was for any potential purchaser of the Properties to absorb all payments and costs in respect of the Land Premium imposed by the State Authorities in respect of the entire Master Lands, any potential purchaser would have had to accept the risk and uncertainty involved in the calculation of the Land Premium by the State Authorities when bidding for the Properties.
>
> ...
>
> I however state that **subsequent to the sale of the Properties and based on *inter alia* the contents of the Minutes of the Taman Puchong Intan Resident's Association Extra Ordinary General Meeting of 23.6.2013** (exhibited as Exhibit "TLF-3" of the House Buyer's Affidavit No 1), **the State authorities had thereafter eventually agreed to impose a lower Land Premium that were not strictly based on the current market value of the Master Lands.**
>
> (emphasis added)

[16] The above relevant part of the affidavit of the liquidator without doubt reveals the qualification to the impugned statement. I am also satisfied as to the circumstances upon which that statement is made even to the extent explaining that the state authorities had eventually agreed to a lower land premium.

[17] The explanation that I have made concerning the extent and scope of the impugned statement would also indicate that *mens rea* is also not proven against the liquidator. For this, the liquidator cannot be accused of harbouring an intention to mislead because the statement as explained was made in the context of what transpired in the meeting with the state authorities. And in this regard there is absolutely no reason to disbelieve the sworn statement of the liquidator.

[18] Essentially the conditions imposed in *Edmund Ming Kwan* (*supra*) on *actus reus* and *mens rea* has not been fulfilled by the applicant.

[19] It is also wise to take note of the Federal Court's case of *Jaginder Singh & Ors v. The Attorney-General* [1983] 1 CLJ 69; [1983] CLJ (Rep) 176; [1983] 1 MLJ 71 where it held:-

> In general, such false testimony will result in the party or witness being liable to prosecution for perjury. Contempt of court would lie not only in the false testimony **but in the obstruction or frustration of the administration of justice.** What is required is **"an evinced intention" to interfere with the course of justice.** That, in our opinion, is what contempt of court is all about. The approach to be taken in such a case as the present was considered by the High Court of Australia in *Coward v. Stapleton* (1953) 90 CLR 573. In that case the court was concerned, not with the standard of proof required in such a case, but with the question whether contempt by prevarication could be established, that is, the conduct of a witness who deliberately evades questions by falsely swearing that he has no recollection. The appellant in that case was a bankrupt who in his public examination gave answers of which a substantial number represented, in the opinion of the Federal Court of Bankruptcy, "a shuffling and a fantastic attempt to conceal the truth" about his financial dealings. The court thereupon ordered that the bankrupt be committed for contempt of court upon the basis that he had refused to answer questions. On appeal the High Court held that "the order must mean that the learned *judge considered that some of the purported answers not only were untrue but were so plainly absurd as to convey an intention not to give any real answers to the questions to which they related".* It was in that context that the court went to make the following observations (pages 578-9):
>
> > It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer. **A disbelief on the part of the court in the truth of the purported answer is not, without more, a sufficient foundation for such a conviction.** The words used,

> considered in their setting and in the light of the demeanour of the witness, must show that in fact the witness is declining to make any reply which can be properly called an answer to the question. **There must be a manifestation in some form of an intention on the part of the witness not to give a real answer.** It is essential not to lose sight of the sharp distinction that exists between a false answer and no answer at all. **Of course a purported answer may be so palpably false as to indicate that the witness is merely fobbing off the question.** His attitude in the box may show that he is simply trifling with the court and is making no serious attempt to give an answer that it is worth calling an answer. In such cases it may well be right to say that the witness refuses to answer the question, but it cannot be too clearly recognised that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt. *Such a committal can be justified only by a specific finding of an evinced intention to leave a question or questions unanswered, or by a finding of contempt in some other defined respect.*
>
> In the event, the appeal was upheld on the ground that the bankrupt had not been given a reasonable opportunity of being heard in his own defence.
>
> What does emerge as a general proposition from *Coward v. Stapleton* (*supra*) is that **"there must be a manifestation in some form of an intention on the part of the witness not to give a real answer",** a *finding that takes the case across the borderline that separates perjury from contempt. False testimony, together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; false testimony, without more, does not.*
>
> (emphasis added)

[20] Therefore, based on the above decision, the applicant needs to prove that the liquidator had the intention not to give a true answer to the statement that has been made. This however cannot be proven as I find that the liquidator had expressly qualified the impugned statement and explained that subsequently the state authorities had agreed to impose a lower land premium that was not based on current market value.

[21] Above all, the facts and findings I have made as narrated regarding the impugned statement, renders the duty of the applicant in proceeding with committal proceedings as one which is onerous and had not been proven beyond reasonable doubt.

[22] I am therefore of the view the application *vide* the notice of motion for leave to commence committal proceedings against the liquidator should not be allowed.

[23] This court will now state its reasons of judgment for encl. 92, the striking out application for encl. 87.

[24] As narrated earlier, the applicant had been before this court at least on two previous occasions, both for encls. 19 and 60. The purpose for both as explained, was to remove the liquidator.

[25] For encl. 60 the applicant had already alluded to the impugned statement against the liquidator. The applicant however chose not to take contempt proceedings against the liquidator when encl. 60 was filed although the impugned statement was a matter already known to the applicant when the same was filed.

[26] This is clearly against the principle of *res judicata* as the applicant should have brought the action on the alleged contempt when encl. 60 was filed. In this regard, this court ought to explain the scope of *res judicata* includes a situation where a matter is possible and present to be raised, but was not put for deliberation for whatever reasons by the party that could raise such matter. It is not merely confined to circumstances where matters have been previously been decided to bar the same from being further litigated. This is best explained in the leading Supreme Court's case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 which cited the decision of *Greenhalgh v. Mallard* [1947] All ER 255 which states:

> … *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but … *it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*.
>
> (emphasis added)

[27] Further in *Huawei Tech Investment Co Limited v. Transition Systems (M) Sdn Bhd* [2013] 1 LNS 329; [2013] 5 MLJ 396, the Court of Appeal in applying the wider principle of *res judicata* said this:

> What was not frequently acknowledged by our courts prior to this decision of the Supreme Court was the wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The wider sense of this doctrine was first acknowledged by Wigram VC in *Henderson v. Henderson* (1843) 3 Hare 100, where the vice chancellor opined that:
>
> > ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, *the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.* The plea of *res judicata* applies,

except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

(emphasis added)

[28] On the facts herein, the applicant has failed to put forward its case for the contempt against the liquidator although the argument on the impugned statement could have been used much earlier when encl. 60 was filed. Therefore encl. 87 is without doubt *res judicata*.

Decision

[29] For all the reasons explained, the application by the applicant for leave to commence committal proceedings against the liquidator is dismissed and the application by the respondent for striking out of that application for leave is allowed.